

**EJECTMENT SUIT NO. 168 of 2009 (Reg No.3226 of 2014)**  
**C.N.R No. WBPS01-000534-2009**

**IN THE COURT OF 4TH BENCH, PRESIDENCY SMALL CAUSE COURT,**  
**CALCUTTA**  
**PRESENT: SMT. ARCHITA SEN, JUDGE, 4TH BENCH, PRESIDENCY SMALL**  
**CAUSE COURT, CALCUTTA.**

**ORDER NO- 102**  
**DATED 07.02.2025:**

Today is fixed for hearing of the petitions dated 19.07.2022 and 11.12.2024, both filed by the defendants. Both the parties file separate attendance through their respective Ld. Advocates.

The record is taken up for hearing of the petition dated 11.12.2024.

Heard both sides. Perused the record.

Considered.

The instant petition contains a prayer for an Order recalling the Order dated 12.11.2024 vide which a cost of Rs.5000/- was imposed upon the defendants. Referring to the long list of dates, as attached with the petition dated 11.12.2024 it is submitted on behalf of the defendants that there was no latches on the part of the defendants. The petition dated 19.07.2022 was heard by the previous Presiding Officer of this Court but no Order was passed. Apart from that on some dates the Court has adjourned the suit suo moto in spite of the fact that both sides filed attendance. For such reason the Order imposing cost upon the defendants may be recalled.

Ld. Advocate for the plaintiffs has not filed any written objection against the instant petition but raised verbal objection against the prayer of the defendants and prayed for rejection of the instant petition.

From the lengthy petition it can be adumbrated by the Court that the defendants were not responsible for the delay in hearing of the petition dated 19.07.2022. The delay occurred due to the reason of the Court itself because on some dates the Court adjourned the suit own its own in spite of the attendance of both the parties and lastly even after hearing the petition the Court did not pass the Order. On perusal of the record it appears that on 19.07.2022 the defendants filed one petition for expunging the evidence of PW-1 on the ground of his death pending the suit. But that petition was filed without any prayer for withdrawing the suit from the peremptory board. So no dates were fixed for hearing of the said petition. Since after filing of the above mentioned petition dates were fixed on 15.09.2022 and 06.12.2022 for cross examination of PW-2. But on those two dates the then Presiding Officer of this Court was on leave. On the next date of hearing, i.e. 21.02.2023 the defendants remained absent without steps. Thereafter on 27.03.2023 defendants filed petition with a prayer for time. On 02.05.2023 on consent of both the parties the said petition was heard without any application for taking off the suit from the evidence board and the next date was fixed for passing Order. Thereafter the Court went vacant, for which the Order could not be passed. On 12.11.2024 the suit was fixed for hearing of the petition dated 19.07.2022 afresh but on that date adjournment petition was filed on behalf of the defendant. So first of all the defendants did not come before the Court with the petition for expunging evidence properly, for which date could not be fixed for hearing of that petition. Then they remained absent on one date without taking any steps and on another date as well as on 12.11.2024 they took adjournments. Much responsibility can be attributed to the defendants for causing delay in the suit. Keeping in view of these conducts of the defendants it can not be stated that there was no latches on the part of the defendants. Now instead of paying the amount of cost the defendants find it safe to place the responsibility on the Court so that they may be exempted from paying the cost.

This Court does not find any reason for recalling the Order dated 12.11.2024 imposing cost upon the defendants.

Accordingly the petition dated 11.12.2024 filed by the defendants is rejected on contest.

The defendants are directed to pay the cost of Rs.5000/- to the plaintiffs on the next date positively, I.d. necessary Order will be passed.

Fix 20.03.2025 for hearing of the petition dated 19.07.2022 filed by the defendants.

Typed, Corrected and Printed by me.

Judge, Bench-4  
PSCC, Calcutta  
J.O Code WB01174

Judge, Bench-4  
PSCC Calcutta  
J.O Code WB01174

**LATER**  
**ORDER NO- 103**  
**DATED 07.02.2025:**

Now the record is taken up for hearing of the petition dated 19.07.2022.

Heard both sides. Perused the case record.

Considered.

No written objection has been filed by the plaintiffs. But the Ld. Advocate for the plaintiffs raised strong objection against the prayer of the defendants.

In instant petition contemplates an Order expunging the evidence of PW-1 as he has expired pending the suit, for which the cross examination of PW-1 could not be completed. So the entire evidence of PW-1 has become *non est* and it should be expunged. The Ld. Advocate for the defendants relied upon the precedent in the case of Vidhyadhar Vs. Manikrao and Another, (1999)3 SCC 573. It was held by the Hon'ble Apex Court in that case that where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct.

On the other hand Ld. Advocate for the plaintiffs submitted that there is no provision in the Code of Civil Procedure for expunging the evidence of any witness. He also referred to the following precedents:

● Radhakrishna Bhat Vs. Radha Hengsu, 2004(1) ICC Karnataka 72:-- There is no provision under the C.P.C or for that matter under any law as to the evidence already recorded can be expunged that too at the behest of the party who has probably given different answer or admission especially in cross examination.

● Bhaswati Ray Vs. Tapasee Chowdhury and Another, 2018(1) CLJ (Cal) 565:-- Same proposition, as laid down in the previous case, was reiterated by the Hon'ble High Court, Calcutta.

● Dever Park Builders Pvt. Ltd. And Others Vs. Madhuri Jalan and Others, AIR 2002 Cal 281:-- The evidence of a person would not be held inadmissible because of his death leaving the cross examination incomplete. There is no provision under the law that if a witness is not cross examined either in full or in part, his evidence would be absolutely rendered inadmissible. How much weight shall be attached to such evidence, should be decided considering other facts and circumstances surrounding it.

On perusal of the record it can be seen that PW-1 was cross examined substantially. But the before completion of the cross examination PW-1 expired. The death of a person can not be treated as his inability to face the cross examination. The death is something which is inevitable but it is beyond anyone's control. So death of PW-1 pending the cross examination shall not be considered as his inability making the entire evidence adduced by him prior to his death inadmissible. So far as the precedent cited by the Ld. Advocate for the defendants is concerned, in that case

defendant no.2, who was the owner of the property and transferred the property to the plaintiff, did not avail himself in the witness box for stating his case. He only filed the written statement admitting the case of the plaintiff. Even he did not cross examine the plaintiff. He lost his interest in the suit after filing the written statement. But in the suit at hand the plaintiff came before the Court and adduced evidence. He also faced the cross examination to certain extent but could not face it till the end because of the reason which was not under his control. So there is no question of drawing adverse presumption under section-114(g) of the Indian Evidence Act. The fact of the instant suit is not at all matching with the case cited by the Ld. Advocate for the defendants. On the other hand, in view of the above discussion and the observation of the Hon'ble Apex Court and Hon'ble High Court, Calcutta regarding the expunge of the evidence of any witness, this Court is constrained to hold that the instant petition has no merit and deserves to be rejected. The evidentiary value of the evidence already adduced by PW-1 will be adjudged at the time of final hearing of the suit.

Accordingly the petition dated 19.07.2022 filed by the defendants is rejected on contest without any cost.

To date for payment of cost by the defendants and further evidence by the plaintiffs.

Typed, Corrected and Printed by me.

Judge, Bench-4  
PSCC, Calcutta  
J.O Code WB01174

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